

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CORNELIUS HONSELAAR,

Defendant-Appellant.

UNPUBLISHED

January 9, 2001

No. 218637

Kent Circuit Court

LC No. 98-004959-FC

Before: Doctoroff, P.J., and Holbrook, Jr., and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of three counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and one count of assault with intent to commit second-degree criminal sexual conduct, MCL 750.520g; MSA 28.788(7). Defendant was sentenced as a second sex offender, MCL 750.520f; MSA 28.788(6), and an habitual second offender under MCL 769.10; MSA 28.1082, to a term of 5 to 7½ years' imprisonment on the conviction of assault with intent to commit second-degree criminal sexual conduct, to a term of 5 to 15 years' imprisonment on the three convictions of second-degree criminal sexual conduct, and to a term of 10 to 25 years' imprisonment on the conviction of first-degree criminal sexual conduct. We affirm.

This case arises out of a series of sexual assaults that defendant committed upon his male victim during June 1994 and August 1995 when the victim was under thirteen years of age. Defendant denied ever sexually assaulting the victim, claiming that it was physically impossible for him to have an erection and ejaculate because he became impotent and unable to ejaculate years before the alleged assault as the result of his affliction with diabetes.

I

Defendant first contends that the trial court abused its discretion by allowing the jury to consider other acts evidence under MRE 404(b). We disagree.

The admissibility of bad acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion exists only when an unprejudiced

person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

Use of bad acts as evidence of character is excluded, except as allowed by MRE 404(b), to avoid the danger of conviction based on a defendant's history of misconduct. *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998). MRE 404(b)(1) provides that

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To be admissible under MRE 404(b), bad acts evidence must satisfy three requirements: (1) the proponent of the evidence must offer the evidence for a proper purpose (i.e., a purpose other than establishing the defendant's character to show his propensity to commit the offense); (2) the prosecutor has the burden of establishing relevance; and (3) the probative value of the bad acts evidence must not be substantially outweighed by its potential for unfair prejudice. *Crawford, supra*, 385; *Starr, supra*, 496; *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), modified 445 Mich 1205; 520 NW2d 338 (1994). A general denial of guilt puts at issue all the elements of a charged offense. *Id.*, 78. Upon request, the trial court must provide a limiting instruction as to the use of the bad acts evidence regardless of whether the evidence was introduced by the prosecutor or the defendant. *Id.*, 74-75.

Here, defendant does not dispute that under the first requirement of *VanderVliet, supra*, the trial court properly determined that the prosecutor sought to introduce the evidence of the two prior convictions for the proper purpose of demonstrating unlikely coincidence and defendant's intent.

Rather, defendant argues that the trial court abused its discretion under the last two requirements of *VanderVliet, supra*. Under the second requirement defendant argues that the prior convictions did not shed any relevance on whether defendant sexually assaulted the victim. To the contrary, the other acts evidence was relevant to show unlikely coincidence—i.e., that the victim had no idea that defendant had been convicted of sexually assaulting young boys when he accused defendant of sexually assaulting him, and it was unlikely that it was coincidental that the victim picked defendant to accuse of such acts. Further, as plaintiff notes, “it is objectively improbable that three young boys who had been in the defendant's care would coincidentally accuse the defendant of misconduct.” See *VanderVliet, supra*, 79 n 35.

In the present case, there was a sufficient factual nexus between the prior acts and the present charged offense to warrant admission of the evidence. *Crawford, supra*, 394-395. One previous victim testified that when he was fourteen years old, defendant fondled him, performed fellatio on him, and forced him to masturbate defendant. Also, the mother of another victim testified that defendant fondled her son who was thirteen years old at the time. Both of those

victims knew defendant through their church; defendant being their camp counselor at the time of the assaults. Although defendant initially denied molesting one of the boys, he eventually pleaded guilty to sexually fondling him. Similar to the previous victims, the victim in the instant case met defendant through his church and was in defendant's care at the time of the sexual assault. Further, defendant denied ever touching the victim in a sexual manner, just as he initially denied previous allegations (Tr IV, 65).

Thus, the trial court properly determined that the evidence was relevant to defendant's intent because in order for the prosecution to prove that defendant committed acts of second-degree criminal sexual conduct, the prosecution must convince a jury that defendant committed the acts for purposes of sexual arousal or gratification. Based upon the evidence that defendant fondled the previous victims, performed fellatio on one, and forced that victim to masturbate him, the jury could infer that defendant fondled the victim in the instant case for the purpose of sexual gratification.

Under the third requirement that the probative value of the bad acts evidence must not be substantially outweighed by its potential for unfair prejudice, defendant argues that the probative value of the prior convictions was substantially outweighed by the danger of unfair prejudice, and a cautionary instruction could not offset the resulting unfair prejudice.

For the purpose of determining whether the probative value of proffered evidence is substantially outweighed by the danger of undue prejudice, we have noted that "[p]rejudice inures when marginally probative evidence would be given undue or preemptive weight by the jury." *Rice, supra*, 441. In the case, the evidence was extremely probative to show defendant's intent, and that it was unlikely that the victim was lying when claiming that defendant sexually assaulted him. The trial court also determined that the evidence was probative to allow plaintiff to refute defendant's claim that his impotence would have prevented him from committing the crimes against the victim.

Defendant has failed to demonstrate that the probative value of the bad acts evidence was substantially outweighed by the danger for unfair prejudice; rather, defendant merely states a conclusion without support. Moreover, we note that the trial court cured any prejudicial effect by reading a cautionary instruction regarding the use of the bad acts evidence.

Because the probative value of the bad acts evidence was not substantially outweighed by its potential for unfair prejudice, we conclude that the trial court did not abuse its discretion when admitting the bad acts evidence relating to defendant's prior two convictions.

II

Defendant's second issue on appeal is that the trial court abused its discretion by limiting the cross-examination of the complaining witness. We disagree.

"[A] trial judge has a great deal of discretion in limiting cross-examination. Such discretion is not subject to review unless a clear abuse of it is shown." *People v Taylor*, 385 Mich 204, 208; 191 NW2d 310 (1971); see MRE 611. However, this claim of constitutional

error is unpreserved for appellate review unless defendant can establish a plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

Under MRE 611, a trial court has broad power to control the manner in which a trial is conducted. Defendant argues that the trial court abused its discretion by limiting defense counsel's cross-examination of the victim on the seventh day of trial to ninety minutes. Specifically, defendant argues that "defense counsel was unable to adequately place before the jury the facts surrounding all of the incidents, the inconsistencies between the reports, complainant's preliminary examination testimony and his testimony at trial." When deciding to limit defense counsel's cross-examination of the victim to ninety minutes and the prosecutor's redirect-examination of the victim to thirty minutes, the trial court noted that defense counsel had already spent five hours cross-examining the victim. Therefore, it appears the trial court limited the victim's cross-examination to make the interrogation more effective for the ascertainment of the truth and to avoid needless consumption of time. MRE 611(a).

We note that the present case does not involve the scenario where the trial court prevented defense counsel from cross-examining the victim after defense counsel used his ninety minutes and requested additional time to complete the cross-examination. Rather, as the trial court noted, defense counsel used only twenty-seven minutes of the ninety minutes allotted to complete his cross-examination of the victim. Despite the court-imposed time restraint, the fact that defense counsel failed to use the complete time available belies his claim that the trial court limited his ability to cross-examine the victim. Therefore, defendant has failed to establish a plain error that affected his substantial rights.

III

Defendant's third issue is that the trial court's remedy for the prosecutor's discovery violations amounted to an abuse of discretion. We disagree.

We review a trial court's decision regarding the appropriate remedy for noncompliance with a discovery order for an abuse of discretion. *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997).

A criminal defendant has a due process right to information that the prosecutor possesses that might lead a jury to entertain a reasonable doubt about the defendant's guilt. *People v Lester*, 232 Mich App 262, 280-281; 591 NW2d 267 (1998). MCR 6.201(A) provides that, upon request, a party must provide all other parties with information that is not protected from disclosure pursuant to MCR 6.201(C). Further, MCR 6.201(B) provides that, upon request, the prosecutor must provide each defendant with exculpatory information known to the prosecutor, including any police report concerning the case. MCR 6.201(B)(1)-(2). If the prosecutor fails to comply with MCR 6.201(B), the trial court may exercise its discretion to order that the testimony or evidence be excluded, or the trial court may order another remedy (e.g., dismissal or adjournment). MCR 6.201(J); *People v Burwick*, 450 Mich 281, 298; 537 NW2d 813 (1995).

After Detective Robert Start's testimony, defense counsel moved for dismissal of the case against defendant for the prosecutor's failure to comply with his discovery request. Specifically, defense counsel argued that he requested "everything from the file," yet did not receive notes

made by Detective Robert Start when he interviewed the victim. Defense counsel also moved for a mistrial if the trial court was unwilling to dismiss the case.

In response to defendant's motions, the prosecutor admitted that she was negligent in failing to go through Detective Start's file; however, she argued that she did not act intentionally. The trial court denied both motions and instead adjourned trial until Monday morning, thus providing defense counsel with a three-day weekend. The trial court reasoned that its decision to deny the motions was particularly appropriate when considering that defense counsel would have the weekend to review Detective Start's notes, and that it would accommodate defense counsel on Monday if he required additional time.

On the following Monday, outside the jury's presence, defense counsel renewed his motions for dismissal and mistrial. Defense counsel argued that while reviewing the photocopies of material from Detective Start's file that the prosecutor provided on the previous Friday, he discovered a transcript of a taped interview of the victim. Defense counsel noted that Detective Start testified that he did not tape record during interviews, that he did not use leading questions when interviewing, and that he did not record his interview with the victim in July 1996. Defense counsel noted that the taped interview of the victim was dated May 1997—a fact that Detective Start failed to mention during his testimony—and that Detective Start consistently used leading questions when interviewing the victim, which was contrary to his previous testimony about not recording interviews and not using leading questions. Defense counsel argued that if the prosecutor had timely disclosed the transcript, he would have retained an expert to testify that Detective Start did not use the correct method of interviewing a child.

Further, defense counsel argued that Detective Start's notes contradicted information contained in the report regarding the timing of at least one of the acts of oral sex. Also, defense counsel argued that Detective Start's notes did not support the statement in the report regarding his attempt to contact defendant, and that defense counsel could have cross-examined Detective Start had he had the notes. Defense counsel further argued that his opening statement would have been different had he had the notes and transcript before trial began, but he did not provide details of how it would be different.

The prosecutor first addressed defense counsel's claim regarding the taped statement of the victim that was not provided in response to defendant's discovery request. According to the prosecutor, Detective Start performed the taped interview of the victim upon the request of the London, Ontario Police Department regarding the sexual assaults that defendant committed on the victim while in Ontario. Thus, the prosecutor argued that because the taped interview did not relate to the investigation of sexual assault that occurred in the United States, she had no duty to disclose it because it was not part of the police report. Also, the prosecutor argued that she did not believe that Detective Start's questions during the taped interview were leading. The prosecutor further argued that even if the questions were leading, defense counsel could not attempt to impeach Detective Start's prior testimony that he never uses leading questions during interviews because Detective Start was performing the taped interview of the victim for the London Police Department.

The prosecutor next addressed defense counsel's claim that Detective Start's notes contradicted the timing of acts of oral sex as stated in the report. The prosecutor argued that

although the events may have been written out of order in the notes, Detective Start knew that the events listed in his notes were not chronological, and that he placed the events in the proper sequence when preparing the report. Also, the prosecutor argued that defense counsel's opening statement would not have been any different because his opening statement addressed all of the points that he claimed he could not address as a result of not having Detective Start's notes.

Before ruling on defendant's renewed motions for dismissal and mistrial, the trial court noted that the Supreme Court in *People v Burwick, supra*, held that the preferred response to discovery violations is to grant an adjournment of the proceedings to allow the party to react to the new information. *Burwick, supra*, 293-294, 298. The trial court denied defendant's renewed motions for dismissal and mistrial, noting that it had already granted an adjournment, and that the three-day weekend was sufficient time to allow defense counsel to react to the new information. The trial court further noted that it believed the prosecutor's failure to provide Detective Start's notes was not intentional, and that it was not a devastating mistake.

On appeal, defendant argues that the trial court should have dismissed the prosecution's case against defendant for failing to timely disclose Detective Start's handwritten notes. We believe that the trial court did not abuse its discretion when refusing to dismiss the case or to grant a mistrial because the trial court granted defense counsel a three-day weekend to review the new information, and the trial court allowed defense counsel to cross-examine Detective Start regarding the information.

We have held that when determining the appropriate remedy for discovery violations, the trial court must balance the interests of the courts, the public, and the parties in light of all the relevant circumstances, including the reasons for noncompliance. *Davie, supra*, 598. Also, we have held that the objecting party must have suffered actual prejudice from the nondisclosure. *Id.* Thus, we conclude that by granting the adjournment and allowing defense counsel to extensively cross-examine Detective Start regarding his notes and the transcript of the taped interview, defendant failed to demonstrate that he suffered actual prejudice, and that the trial court provided a sufficient remedy for the prosecutor's unintentional and non-devastating discovery violation.

IV

Defendant's fourth and final argument on appeal is that the trial court improperly resentenced him after imposing a valid sentence. We disagree.

The determination of whether a trial court lacked authority to resentence a defendant depends upon whether the original sentence was valid or invalid. MCR 6.429(A); *People v Harris*, 224 Mich App 597, 599-600; 569 NW2d 525 (1997). A sentence is invalid if the trial court "fails to exercise its discretion because it is laboring under a misconception of the law." *In re Jenkins*, 438 Mich 364, 369 n 3; 475 NW2d 279 (1991) (quoting *People v Whalen*, 412 Mich 166, 170; 312 NW2d 638 (1981)).

Defendant argues that his initial sentence of 3 to 5 years' imprisonment for the assault with intent to commit second-degree criminal sexual conduct conviction was a valid sentence. Specifically, defendant argues that the trial court realized at the time of sentencing that it could

sentence defendant either as a second sex offender, MCL 750.520f; MSA 28.788(6), or as an habitual second offender, MCL 769.10; MSA 28.1082, and the trial court should not be allowed to subsequently decide to simultaneously sentence him as a second sex offender and as an habitual second offender.

Contrary to defendant's argument, the December 7, 1998 sentence was invalid for two reasons. First, the trial court erred in sentencing defendant as a second sex offender to a term of 3 to 5 years' imprisonment on the assault with intent to commit second-degree criminal sexual conduct conviction when MCL 750.520f(1) and (2); MSA 28.788(6)(1) and (2) requires the trial court to sentence defendant to a mandatory minimum sentence of at least five years. Further, by sentencing defendant as a second sex offender under MCL 750.520f(1) & (2); MSA 28.788(6)(1) & (2), a five-year sentence would not conflict with MCL 750.520g(2); MSA 28.788(7)(2), which prevents the trial court from sentencing defendant to more than five years for assault with intent to commit second-degree criminal sexual conduct. Therefore, if the trial court had validly sentenced defendant as a second sex offender for the assault with intent to commit second-degree criminal sexual conduct conviction, he would have been sentenced to a total term of five years' imprisonment.

The second reason that the sentence was invalid is because the trial court made a fundamental mistake of law by determining that it could not simultaneously sentence defendant as a second sex offender and as an habitual second offender. *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997) (holding that a sentence is invalid if it is based on a misconception of law). At the resentencing, the trial court explained that it initially sentenced defendant as a second sex offender under "the mistaken belief that prior offenses of a sexual nature could be utilized, either to support an allegation of prior sexual misconduct or a habitual information, but not both." The trial court explained that it was only after sentencing defendant that it discovered a case from this Court, *People v James*, 191 Mich App 480, 482; 479 NW2d 16 (1991), that held that prior sex offenses may be used to sentence a defendant both as a second sex offender and as an habitual second offender because one statute addresses the mandatory minimum sentence whereas the other statute permits enhancing the maximum sentence. When resentencing defendant, the trial court never addressed its mistake of erroneously sentencing defendant as a second sex offender to a term of 3 to 5 years' imprisonment for the assault with intent to commit second-degree criminal sexual conduct conviction. Rather, the trial court explained that it had the authority to resentence defendant, noting that it "made a fundamental mistake of law, which it readily acknowledges, now having learned otherwise, the first sentences were . . . ones that may properly be set aside and new sentences imposed."

Because defendant's initial sentence was invalid, the trial court had the authority to resentence defendant. MCR 6.429(A). Thus, the trial court properly resentenced defendant simultaneously as a second sex offender and as an habitual second offender for the assault with intent to commit second-degree criminal sexual conduct conviction. Specifically, the trial court sentenced defendant to a minimum sentence of five years' imprisonment under MCL 750.520f(1) & (2); MSA 28.788(6)(1) & (2) and MCL 750.520g(2); MSA 28.788(7)(2), and it sentenced defendant to a maximum sentence of 7½ years' imprisonment under MCL 769.10(1)(a); MSA 28.1082(1)(a).

We conclude that because the trial court misunderstood the law when it initially sentenced defendant, the trial court had the authority to resentence defendant. Hence, we affirm the trial court's March 15, 1999 judgment of resentence.

Affirmed.

/s/ Martin M. Doctoroff

/s/ Donald E. Holbrook, Jr.

/s/ Michael R. Smolenski